

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

<u>WILLIS R. WHITING, JR., et al.,</u>)	
Plaintiffs,)	
)	
v.)	
)	
<u>BUFFALO PUMPS, INC., et al.,</u>)	
Defendants.)	
<u>GERTNER, D.J.</u>)	

Civil Action No. 08cv11022-NG

ORDER OF REMAND

May 4, 2009

This is an asbestos personal injury action. Plaintiff Willis Whiting served in the Navy aboard the USS Guadalcanal from 1968 to 1972. See Compl. ¶ 9, Ex. to Notice of Removal (document # 1-2). After leaving the Navy, he repaired automobiles and performed home improvements and renovation work. Whiting's exposure to asbestos during the course of his Navy service and subsequent employment allegedly caused him to develop malignant mesothelioma. See id. at ¶ 11.

The plaintiffs filed suit in Massachusetts state court, charging that the defendants were responsible for his asbestos-related disease. They seek relief on theories of negligence, breach of warranty, and gross negligence, as well as loss of consortium. The plaintiffs claim that the removing defendants breached their duties to Whiting in failing to warn him about asbestos and its health hazards; they do not allege defective design against these defendants. Id. at ¶¶ 17, 26 (disclaiming defective-design theories against manufacturers of equipment installed on Navy vessels). All of the plaintiffs' claims are based on state law. See id.

One of the defendants, Buffalo Pumps, Inc. ("Buffalo Pumps"), removed the case from Massachusetts Superior Court to this Court. According to Buffalo Pumps, during the time when its actions allegedly led to Willis Whiting's exposure to asbestos, it was acting under the

government's instructions as a federal contractor. See Buffalo Pumps' Mem. in Opp. Mot. Remand (document # 9); Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (describing the federal contractor defense). As a result, Buffalo Pumps argues that it is entitled to a federal forum under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). See Mesa v. California, 489 U.S. 121 (1989) (construing the federal officer removal statute). The plaintiffs oppose removal and seek to return the case to state court. Accordingly, they have filed a Motion to Remand (document # 5).

Both the defendant itself and the evidence it submits in support of removal are all but identical to the parties and arguments addressed in this Court's May 4, 2009 Memorandum and Order in Holdren v. Buffalo Pumps, Inc., Case No. 08cv10570-NG. For the reasons stated therein, the Court finds that the removing defendant has failed to raise a colorable federal defense and, separately, has failed to satisfy the causation requirement of the removal statute, 28 U.S.C. § 1442(a)(1). As a result, this Court lacks subject-matter jurisdiction over the pending action. Plaintiffs' Motion to Remand (document # 5) is **GRANTED**.

For the reasons set forth above, this case is hereby **REMANDED** to the Middlesex Superior Court of Massachusetts.

SO ORDERED.

Date: May 4, 2009

/s/ Nancy Gertner
NANCY GERTNER, U.S.D.C.